Supreme Court, U.S.
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No. 96-516

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, THE STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FLORIDA, FIRST DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

[Petitioner's question restated]

Whether a state sales tax of general applicability, which applies to all non-exempt purchases of tangible personal property, and which does not single out the press for special treatment, violates the First Amendment and the Equal Protection Clause of the United States Constitution?

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STATEMENT OF THE FACTS

This case concerns the interpretation and application of a taxing statute (Section 212.05, Florida Statutes); an exemption statute from the taxing statute (Section 212.08(5)(b)1. and 2., Florida Statutes); and an exception to the exemption from a taxing statute (Section 212.08(5)(b)5., Florida Statutes).

Section 212.05, Florida Statutes, imposes a tax upon the sale of tangible personal property. The tax is applied to ALL sales of tangible personal property including equipment and machinery used by Florida businesses. Contained in Chapter 212, Florida Statutes, is an **exemption** from the payment of sales tax, imposed by Section 212.05, Florida Statutes, on the purchase of certain items "used" in a new or expanding business. Section 212.08(5)(b)1. and 2., Florida Statutes, provides an exemption from the payment of sales tax on the purchase of machinery and equipment used in the manufacturing, processing, compounding or producing items of tangible personal property.

Machinery or equipment used by a business for

purposes other than the manufacturing or producing items of tangible personal property are **not** subject to the exemption. Section 212.08(5)(b)5., Florida Statutes, contains a list of those industries that process, manufacture, compound, or produce items of tangible personal property that are not eligible for the exemption; those industries are specifically excepted from the exemption to the Florida sales tax. The purchase of machinery and equipment by printing or publishing firms are not eligible for the exemption. Section 212.08(5)(b)5., Florida Statutes

R.R. Donnelley & Sons Co. (hereafter "Donnelley"), is a large commercial printing company. Donnelley opened a new printing plant in Florida in 1991. Donnelley purchased machinery and equipment to be used in the printing process. In 1993, Donnelley expanded its printing operation, purchased additional equipment and remitted the sales tax on those purchases. Thereafter, Donnelley submitted a request for a refund to the Florida Department of Revenue (hereafter "the Department"), citing the exemption found in Section 212.08(5)(b)1. and 2., Florida Statutes. The

Department denied the request based on the provisions in Section 212.08(5)(b)5., Florida Statutes.

However, Section 212.08(5)(b)5., Florida Statutes, was amended during the 1996 Florida Legislative session. Under Chapter 96-320, Section 15, p. 1524-1526, Laws of Florida, the Florida Legislature decided to extend the exemption contained in Section 212.08(5)(b)1. and 2., Florida Statutes, to printing firms, such as Donnelley, by removing printing firms from the exception contained in Section 212.08(5)(b)5., Florida Statutes. Effective July 1, 1996, printing firms are now exempt from remitting sales tax on purchases of equipment for new and expanding businesses, so long as all other applicable conditions under 212.08(5)(b)1. and 2., Florida Statutes, are met by the printing firms. Any future impact that would come from a decision on the merits by this Court, have now been mooted.

STATEMENT OF THE CASE

On November 9, 1993, Donnelley filed a complaint, and later an amended complaint, challenging the validity of Section 212.08(5)(b)5., Florida Statutes. Donnelley did not

challenge the underlying sales tax, Section 212.05, Florida Statutes, or the exemption from the payment of the sales tax for machinery or equipment, Section 212.08(5)(b)1., or Section 212.08(5)(b)2., Florida Statutes. Donnelley challenged the **exclusion** from the exemption contained in Section 212.08(5)(b)5., Florida Statutes. The relief Donnelley sought was an "extension" of the exemption.

The trial court denied the relief sought by Donnelley and the First District Court of Appeal affirmed the trial court. *R.R. Donnelley & Sons Co. v. Fuchs*, 670 So. 113 (Fla. 1st DCA 1996). Donnelley sought discretionary review before the Florida Supreme Court, which was denied. *R.R. Donnelley & Sons Co. v. Fuchs*, 677 So. 2d 841 (Fla. 1996).

SUMMARY OF ARGUMENT

Donnelley has not presented a Federal question under either the First Amendment or the Equal Protection Clause for resolution by this Court. Florida has not singled out the press for taxation upon the purchase of new equipment.

The Florida sales tax is one of general application permissible under the First Amendment. Florida has not singled out the press in the exception to the exemption. A host of industries are similarly treated.

Donnelley has not shown an "infringement" of any constitutional right under the First Amendment. There has been no abridgement of First Amendment guarantees.

Florida's exemption from taxation does not infringe on any of the Petitioner's First Amendment rights, is not inconsistent with any decision of this Court or another state supreme court, and does not present an important issue of federal law.

Donnelley misconstrues and misapplies an Equal Protection analysis. Other industries which "manufacture" tangible personal property for sale are included in the

exception to the exemption. There is no proof that there is any invidious reason for printers not receiving the exemption or that printers are singled out based on the content of what they print. Section 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meets Equal Protection standards.

Section 212.08(5)(b)5., Florida Statutes, was amended during the 1996 Florida Legislative session. Under Chapter 96-320, Section 15, p. 1524-1526, Laws of Florida, the Florida Legislature decided to extend the exemption contained in Section 212.08(5)(b)1. and 2., Florida Statutes, to printing firms, such as Donnelley. Any future impact that would come from a decision on the merits by this Court, have now been mooted. The Petition should be denied.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE MASSACHUSETTS SUPREME JUDICIAL COURT

Donnelley has not presented a Federal question under either the First Amendment or the Equal Protection Clause for resolution by this Court. Florida has not singled out the press for taxation upon the purchase of new equipment. All purchases of new equipment are subject to the sales tax in Florida. In order to encourage manufacturing in an otherwise tourist dependent state, the Florida Legislature has enacted an exemption from the payment of sales tax to certain manufacturing businesses when they purchase equipment used in the manufacturing process. By this means, the Florida Legislature hopes to encourage manufacturers to locate in Florida and to bring diversification to the State's economy.

Donnelley claims that its First Amendment rights are violated because it must pay a "printing tax." This is untenable. The Florida sales tax is one of general application

permissible under the First Amendment. *See Arkansas Writer's Project, Inc., v. Ragland*, 481 U.S. 221 (!987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 586 n.9 (1983). Florida has not singled out the press in the exception to the exemption. A host of industries are similarly treated. Certainly, there is no discrimination based on the content of any particular idea which Donnelley might espouse, nor any showing of any invidious attempt by Florida to suppress the dissemination of ideas. Donnelley's inability to take advantage of an exemption does not run afoul of either the United States Constitution or the Florida Constitution.

All purchases of printing equipment are subject to the exception to the exemption. There is no question that the purchases in question are properly subject to the sales tax. The basis of Donnelley's complaint is the Florida Legislature did not choose to exempt the purchase of printing equipment from the imposition of the sales tax.

The Florida Supreme Court has held that the retail sales of newspapers and magazines are subject to sales tax.

See Department of Revenue v. Magazine Publishers, Inc., 603 So. 2d 459 (Fla. 1992). The Florida Supreme Court found that Florida's sales tax, imposed by Chapter 212, Florida Statutes, is a tax of general applicability, which applies to receipts from the sales of tangible personal property, unless specifically exempted, and does not single out the press for special treatment.

Donnelley has not shown an "infringement" of any constitutional right under the First Amendment. There has been no abridgement of First Amendment guarantees. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). In *Branzburg*, this Court, in describing the facts of the cases before it that concerned the question of whether a reporter could be required to testify before a grand jury after witnessing a crime, stated "but these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of

published material is at issue here." *Id.*, at 681.

Donnelley relies primarily on *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In that case, Minnesota enacted a "special tax" that did not apply to anyone except the press. In fact, it affected only " . . . 11 publishers, producing 14 of the 388 paid circulation newspapers in the State . . ." *Minneapolis Star*, 460 U.S., at 578. This Court agreed that a tax of general applicability can be imposed upon the press. *Minneapolis Star*, 460 U.S., at 581. But what the Court found invalid was that Minnesota chose not to apply its general sales tax to the newspapers, in their purchase of ink and paper, but chose instead to create a new and separate tax effecting only the press. *Minneapolis Star*, 460 U.S., at 582. Rather than taxing the ultimate retail sale, Minnesota chose to tax the tangible components of the press. *Id.* This Court also struck the tax because, besides singling out the press, it then discriminated against a small group of newspapers. *Minneapolis Star*, 460 U.S., at 591.

Donnelley also cites *Grosjean v. American Press Co.*,

297 U.S. 233 (1936). This case is very narrow in scope. In *Grosjean*, a state used a tax as a direct weapon to strike at the dissenting press. "All but one of the large papers subject to the tax had 'ganged up' on Senator Huey Long, and a circular distributed by Long and the Governor of Louisiana to each member of the state legislature described 'lying newspapers' as conducting a 'vicious campaign' and the tax was 'a tax on lying, 2c [*sic*] a lie.' *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. at, 579-580. The Court compared the Louisiana tax to the English Parliament's attempt to muzzle the colonists through the Stamp Act tax on newspapers and pamphlets.

The Florida decision in *Donnelley*, also does not conflict with the decision in *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991). The legislative action in Massachusetts differs from that of Florida. In Massachusetts, all manufacturers were eligible to receive the exemption from certain sales taxes. This included all machinery and replacement parts in all manufacturing processes. *Id.*, at 618. The error committed

by that legislature was to remove publishing, and only publishing, from the scope or the exemption. Thus publishing was singled out for differential tax treatment. Such is not the case in Florida.

Donnelley has neglected to discuss *Leathers v. Medlock*, 499 U.S. 437 (1991). This Court answered the claims Donnelley wishes to again raise. Taxing one media "differently from other media does not by itself, . . ., raise First Amendment concerns." *Id.*, 499 U.S., at 444. *Leathers* suggests that differential tax treatment among the press based upon format was permissible so long as the differential tax treatment does not have the effect of singling out a small group within the media. A review of its past cases led this Court to rule that:

> differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress expression of particular ideas or viewpoints.

Leathers, 499 U.S., at 447. A threat to suppress expression comes by 1) singling out the press; 2) targeting a small group of speakers; or 3) discriminating on the basis of the content

of the speech. *Leathers,* 499 U.S., at 447. If a state tax scheme does not implicate any of the three enumerated evils, then there has been no First Amendment infringement. Section 212.08(5)(b), Florida Statutes, does not implicate any of the enumerated evils.

It is apparent that Florida's taxing statutes, and Section 212.08(5)(b)5., Florida Statutes, specifically, do not single out the press; do not target a small group of the press and do not discriminate because of content. All purchases of machinery are subject to the Florida sales tax. Section 212.05, Florida Statutes. Only where there is an express exemption from Section 212.05, Florida Statutes, will a purchaser not have to pay the Florida sales tax.

So what is exempt? Only "new" machinery for a "new" or "expanding" business is eligible for the exemption. New or replacement machinery for an existing business is not eligible, including toaster manufacturers and publishing houses. New equipment purchased after a "new" business goes into operation is not exempt. Section 212.08(5)(b)1., Florida Statutes. New equipment not identified as "Section

38 property" under Section 48(a)(1)(A) of the Internal Revenue Code is not exempt. Section 212.08(5)(b)6.a., Florida Statutes. If the expanding business does not increase the output by 10 percent, the equipment is not exempt. Section 212.08(5)(b)2., Florida Statutes. In an expanding business, only the amount of sales tax in excess of $100,000, no matter the business, is exempt. Section 212.08(5)(b)2., Florida Statutes. Finally, a number of industries that produce tangible personal property in Florida, along with publishing companies, are not entitled to the exemption. Section 212.08(5)(b)5., Florida Statutes. For example, electric utilities do produce tangible personal property in the form of electrical energy[1/], mining companies produce and process phosphate, and oil and gas is produced after the refinery process. Printing and publishing companies are NOT the only producers of tangible personal property that do not receive the exemption.

[1/] Electric energy is specifically defined as tangible personal property in Section 212.02(20), Florida Statutes.

The Legislature created an exemption, based on use, for machinery and equipment used in new and expanding businesses in this State. Section 212.08(5)(b), Florida Statutes, and Section 212.08(5)(b) 1., and 2., Florida Statutes, state in pertinent part:

> (5) EXEMPTIONS: ACCOUNT OF USE.
> (b) Machinery and equipment used to increase productive output.--
> 1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound or produce for sale . . . items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter. . . .
> 2. Industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale . . . items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter in excess of $100,000 per calendar year. . .

However, the Legislature excepted from the "exemption" the purchase of equipment or machinery used by certain listed industries in Section 212.08(5)(b)5., Florida Statutes, which

states:

> 5. The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining, or processing operations, oil or gas exploration or production operations, printing or publishing firms, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business Regulation, or any firm which does not manufacture, process, compound, or produce for sale . . . items of tangible personal property. (e. s.)

Those industries listed in Section 212.08(5)(b)5., Florida Statutes, cannot utilize the exemption created by Section 212.08(5)(b)1., and 2., Florida Statutes.

Neither the exemption or the exception from the exemption are based upon the content of any speech or speaker. Section 212.08(5)(b)1., 2., and 5., Florida Statutes.

The Florida Legislature, like many state legislatures, made a decision to encourage businesses not present in Florida to come and set up a manufacturing plant in

Florida.[2]/ The states need to have the latitude to give incentives to companies that create jobs.

Florida's exemption from taxation does not infringe on any of the Petitioner's First Amendment rights, is not inconsistent with any decision of this Court or another state supreme court, and does not present an important issue of federal law.

Donnelley has implicitly raised an Equal Protection argument. Petitioner's Brief, p.10. Donnelley claims the Florida courts have erred in applying Equal Protection criteria to Donnelley. Donnelley claims that its rights under the Equal Protection Clause of the United States Constitution have been violated because Donnelley must pay the tax on its purchases of machinery to begin and to expand its business in Florida. To this end, Donnelley submits that it manufactures tangible personal property for sale and does

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[2]/ For example, Florida has been encouraging motion picture companies to set up studios in Florida. To help the companies, Florida has exempted the purchase of many types of equipment used in the motion picture business. *See* Section 212.08(5)(b)1., Florida Statutes.

not receive an exemption. Donnelley submits that because other companies which manufacture tangible personal property for sale do receive the exemption; Donnelley's rights are violated.

Donnelley misconstrues and misapplies an Equal Protection analysis. Other industries which "manufacture" tangible personal property for sale are included in the exception to the exemption. One example is the restaurant industry. Thus, even within the "class" Donnelley seeks to establish, Donnelley is not alone in being excluded from the exemption. There is no proof that there is any invidious reason for printers not receiving the exemption or that printers are singled out based on the content of what they print.

Clearly, tax exemptions in Florida represent a legislative decision that there is a State purpose to be served in relieving a particular person or business from the imposition of the tax. This legislative decision must have a rational basis. That is, there must be a rationally conceivable basis for the classification for states are given great latitude

in making tax classifications and the burden is very heavy on one who seeks to overturn such a classification. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87-88 (1940). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores of Ohio, Inc., v. Bowers*, 358 U.S. 522, 528 (1958).

Although the state must adhere to the principles of due process and Equal Protection when exercising its taxing power, those principles do not impose an ironclad rule of equality. The state must be allowed the flexibility and variety appropriate to taxation schemes. *Kahn v. Shevin*, 416 U.S. 351 (1974). Accordingly, the state is accorded a wide range of discretion when classifying for taxation purposes, provided that the classification is reasonable, nonarbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation.

In *Lindsley v. National Carbolic Gas Co.*, 220 U.S. 61, 78 (1911), this Court stated:

> When the classification in such a law is called into question, if any state of facts can

> be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

The burden for the Department is to set out a reasonable state of facts that would support the classification. There is no requirement that such facts were considered by the Legislature nor that such facts existed when the statute was enacted.

Section 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meets Equal Protection standards. The Legislature could well have determined that certain businesses offered special advantages or benefits to Florida such as job creation, increased spending in local communities, improvement to quality of life in Florida, acting as magnet to draw other businesses to Florida, or increasing tourist travel to Florida. These would all be rational grounds for a decision to relieve a company of the imposition of the tax.

The Legislature could also well have determined that printers did not offer a particular advantage or benefit to Florida or that any benefit obtained would not offset the loss of revenue caused by an exemption. For example, a modern

printing plant such as Donnelley's requires a large investment in machinery, but is highly automated. The Legislature could well have determined that this state of facts did not warrant extending the exemption to Donnelley. It is a conceivable, rational state of facts which demonstrates a rational basis for not extending the exemption to printers. Thus, the differentiation of treatment in the statute has a rational basis and should be upheld. No higher level of scrutiny is needed because there is no invidious purpose or discrimination against printers shown in the record.

Thus, the legislature's decision to exclude printers from the exemption contained in Section 212.08(5)(b)1., and 2., Florida Statutes, does not violate the Equal Protection Clause of the United States Constitution.

CONCLUSION

WHEREFORE, the Department submits, based on the foregoing arguments and authorities, that both the trial court and the district court were correct in upholding the statutes by finding that they did not violate either the First

Amendment or the Equal Protection Clause of the United States Constitution. The decisions below are consistent with the decisions of the United States Supreme Court and they warrant no further review by this Court.

Respectfully submitted,

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